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No. 90-590

In the Supreme Court of the United States

OCTOBER TERM, 1990

MATTHEW FOLLETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, in determining the weight of lysergic acid diethylamide (LSD) for sentencing purposes, the court correctly considered the combined weight of the LSD and the blotter paper used as a carrier medium for the drug.

2. Whether the court of appeals erred in declining to review the district court's refusal to depart downward from the indicated Sentencing Guidelines range.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 905 F.2d 195.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1990. A petition for rehearing was denied on July 5, 1990. Pet. App. 15. The petition for a writ of certiorari was filed on October 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of Iowa to a single count of possessing lysergic acid diethylamide

(LSD) with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to a term of 84 months' imprisonment, to be followed by a four-year term of supervised release, and he was fined $20,000. The court of appeals affirmed. Pet. App. 9-14.

1. The pertinent facts are summarized in the opinion of the court of appeals. William Emanuel was arrested for distributing LSD in and around Iowa City, Iowa. Following his arrest, Emanuel telephoned petitioner, who distributed LSD supplied by Emanuel, to discuss a drug transaction. Petitioner told Emanuel that he had sold 20 sheets of blotter paper imbedded with LSD within the past week and, in addition, had customers waiting to purchase approximately 15-30 sheets of LSD. Emanuel replied that because of his arrest he did not want to "touch anything." Petitioner therefore agreed to deal directly with Emanuel's supplier in California; however, no transaction was arranged, since the California supplier refused to deal with anyone connected with Emanuel after Emanuel's arrest. Emanuel ultimately agreed to cooperate with law enforcement authorities. Although no controlled purchase was ever made from petitioner, Emanuel testified before the grand jury that he had sold petitioner approximately 2,500 dosage units of LSD. Pet. App. 2.

2. Petitioner was initially charged with possessing more than ten grams of LSD with the intent to distribute it[1] and with conspiring to distribute LSD. Pursuant to plea negotiations, petitioner subse-

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[1] Under 21 U.S.C. 841(b)(1)(A)(v), anyone who commits an offense involving "10 grams or more of a mixture or substance containing a detectable amount of [LSD]" is subject to a mandatory minimum term of ten years' imprisonment.

quently pleaded guilty to a one-count information charging him with possessing with the intent to distribute 2,500 dosage units of LSD. Under the terms of the plea agreement, it was stipulated (subject to petitioner's objection to counting the weight of the carrier medium when determining the total quantity of the drug involved) that petitioner possessed in excess of one gram of a mixture or substance containing LSD, that he could have reasonably foreseen a total quantity of 7-9.9 grams of LSD, and that he had accepted responsibility for his criminal conduct.[2] Pet. App. 2-3.

At the sentencing hearing, the district court found that the base offense level under the Sentencing Guidelines, see United States Sentencing Comm'n, *Guidelines Manual* § 2D1.1(a)(3) Drug Quantity Table (Nov. 1, 1990), based on the stipulated combined weight of the LSD and the carrier medium, was level 30. The court gave petitioner a two-level reduction in the offense level for accepting responsibility, but found that no other adjustments were appropriate. Petitioner was thus subject to a Guidelines range of 78-97 months' imprisonment, and his 84-month sentence was within that range. Pet. App. 3.

Petitioner moved that the district court depart downward from the indicated Guidelines range on the basis of his asserted diminished mental capacity at the time of the offense. See Guidelines § 5K2.13.[3]

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[2] Under 21 U.S.C. 841(b)(1)(B)(v), anyone committing an offense involving one gram or more but less than ten grams of a mixture or substance containing LSD is subject to a mandatory minimum term of five years' imprisonment.

[3] Sentencing Guidelines § 5K2.13 provides:

> If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not

In support of his motion, petitioner presented evidence showing that he had a history of psychological problems. In particular, the evidence showed that petitioner maintained "only superficial emotional interests in people, situations, [and] events" and that, at the time of the crime, he suffered from "a severe mental disorder—being close to psychosis—major depression, * * * with a mixed personality disorder, * * * with narcissistic, passive aggressive, and impulsive features." Pet. App. 5, 7. The evidence also showed that petitioner had long abused alcohol and drugs, but had refused to undergo treatment to improve his condition. *Id.* at 5. Finally, the evidence showed that petitioner was of above average intelligence and had "no cognitive deficiencies in his ability to calculate, in his fund of knowledge, in his orientation or in his memory." *Ibid.*

After considering the psychological evidence, the district court declined to depart below the indicated Guidelines range. The court imposed a sentence of 84 months' imprisonment.

3. The court of appeals affirmed. Pet. App. 1-8. First, the court held that the district court's refusal to depart below the indicated Guidelines range was "not reviewable on appeal." *Id.* at 3. Second, the court of appeals held that LSD carrier mediums constitute "mixture[s] or substance[s] containing a detectable amount" of the drug and therefore must be included in calculating the drug's weight. *Id.* at 4.

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resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

Judge Heaney dissented. In his view, petitioner's 84-month term of imprisonment was "an inordinately long sentence for a 19-year-old first offender." Pet. App. 5. Stating that "a departure w[ould] serve the interests of society and the defendant better than the sentence imposed," *id.* at 8, Judge Heaney would have remanded the case for resentencing to consider petitioner's mental condition. *Id.* at 7.

ARGUMENT

1. The first question presented in the petition is the same as one of the questions presented in *Chapman* v. *United States*, cert. granted, No. 90-5744 (Dec. 10, 1990). The petition should therefore be held pending this Court's decision in *Chapman*, and then should be disposed of as appropriate in light of that decision.

2. Petitioner also contends that the court of appeals erred in holding that it lacked authority to review the decision of the district court to impose a sentence within the indicated Guidelines range rather than to depart downward from the Guidelines. Pet. 11-13. Petitioner's claim lacks merit in two respects.

a. First, it is axiomatic that there is no right of appeal in criminal cases absent explicit statutory authorization. See, *e.g.*, *United States* v. *DiFrancesco*, 449 U.S. 117, 131 (1980); *Abney* v. *United States*, 431 U.S. 651, 656 (1977). Prior to the enactment of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.* and 28 U.S.C. 991-998, appellate courts generally lacked authority to review sentences imposed within the range provided by statute. *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972). The Sentencing Reform Act expanded appellate review of

sentences but limited that review to certain categories of claims. Under 18 U.S.C. 3742(a), a defendant may challenge his sentence on appeal on the grounds that it "(1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is greater than the sentence specified in the applicable range * * *; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." Petitioner has failed to show that his claim (*i.e.*, that the district court failed to depart below the indicated Guidelines range) fits into any of those categories of reviewability.

Petitioner's sentence was not imposed in violation of law within the meaning of subsection (a)(1) of 18 U.S.C. 3742 since his sentence was well within the statutory maximum of 40 years' imprisonment authorized by 21 U.S.C. 841(b)(1)(B)(v). Moreover, petitioner's sentence was not reviewable under subsections (a)(3) or (a)(4) of 18 U.S.C. 3742 because there is a specific Guideline provision for drug offenses, see Guidelines § 2D1.1, and petitioner's sentence was within the applicable Guidelines range specified for his offense. Finally, petitioner cannot claim that his sentence was imposed as a result of an incorrect application of the Guidelines within the meaning of subsection (a)(2) of 18 U.S.C. 3742: taken together, 18 U.S.C. 3553(b) and Guidelines § 5K2.13 provide that a district court "may" depart below the Guidelines range as a matter of discretion if there are extraordinary circumstances showing that the defendant's reduced mental capacity contributed to the commission of his offense. In this case, the district court did not refuse to depart below the recommended Guidelines range on the ground that

the court lacked the authority to do so; rather, after considering petitioner's evidentiary submissions, the court refused to depart downward because, in the court's view, none of the mitigating evidence submitted by petitioner warranted a downward departure.

In comparable circumstances, every court of appeals that has considered this question has held that the discretionary refusal by a sentencing judge to depart downward from the applicable Guidelines range is not reviewable on appeal under 18 U.S.C. 3742(a). *United States* v. *Tucker*, 892 F.2d 8, 9-11 (1st Cir. 1989); *United States* v. *Colon*, 884 F.2d 1550, 1552 (2d Cir.), cert. denied, 110 S. Ct. 553 (1989); *United States* v. *Denardi*, 892 F.2d 269, 272 (3d Cir. 1989); *United States* v. *Bayerle*, 898 F.2d 28, 30-31 (4th Cir.), cert. denied, 111 S. Ct. 65 (1990); *United States* v. *Draper*, 888 F.2d 1100, 1105 (6th Cir. 1989); *United States* v. *Franz*, 886 F.2d 973, 976 (7th Cir. 1989); *United States* v. *Evidente*, 894 F.2d 1000, 1003-1005 (8th Cir.), cert. denied, 110 S. Ct. 1956 (1990); *United States* v. *Morales*, 898 F.2d 99, 102-103 (9th Cir. 1990); *United States* v. *Soto*, No. 89-2254 (10th Cir. Nov. 8, 1990), slip op. 3-4; *United States* v. *Fossett*, 881 F.2d 976, 979-980 (11th Cir. 1989); *United States* v. *Ortez*, 902 F.2d 61, 63-64 (D.C. Cir. 1990). See also *United States* v. *Rojas*, 868 F.2d 1409, 1410 (5th Cir. 1989); *United States* v. *Buenrostro*, 868 F.2d 135, 139 (5th Cir. 1989), cert. denied, 110 S. Ct. 1957 (1990); *United States* v. *Wright*, 895 F.2d 718, 722 (11th Cir. 1990). This Court recently declined to review this issue in *Conway* v. *United States*, cert. denied, 111 S. Ct. 258 (1990). Further review of this issue is therefore unwarranted.

b. Even if petitioner's claim were subject to review on appeal, petitioner could not prevail. Guidelines § 5K2.13 provides that a district court "may" depart below the indicated Guidelines range only if the defendant has "committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants" and then only to "the extent to which reduced mental capacity contributed to the commission of the offense." Rather than showing that petitioner suffered from "significantly reduced mental capacity," the evidence proffered by petitioner showed that petitioner was of above average intelligence and had "no cognitive deficiencies." Pet. App. 5. He also had a long and persistent history of voluntary drug and alcohol abuse for which he had refused treatment to improve his condition. *Ibid.* Thus, petitioner did not qualify for a departure under the terms of Guidelines § 5K2.13. At most, petitioner demonstrated that he had a history of psychological and emotional problems. But as Guidelines § 5H1.3 makes clear, "[m]ental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the guidelines." The district court therefore did not abuse its discretion in refusing to depart below the indicated Guidelines range.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Chapman* v. *United States*, cert. granted, No. 90-5744 (Dec. 10, 1990), and then should be disposed of as appropriate in light of that decision. In all other respects the petition should be denied.

Respectfully submitted.

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